IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION



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| UNITED STATES OF AMERICA,<br>Plaintiff, | ) | |
| vs. | ) | CR-00-N-0422-S |
| ERIC ROBERT RUDOLPH,<br>Defendant. | ) | |

**MOTION TO DISMISS NOTICE OF SPECIAL FINDINGS AND GOVERNMENT'S NOTICE OF INTENT TO SEEK THE DEATH PENALTY FOR UNTIMELY FILING OF DEATH NOTICE**

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## PROCEDURAL HISTORY

Defendant ERIC ROBERT RUDOLPH was originally indicted on November 12, 2000. The initial charging instrument contained two counts: the first accusing the defendant of using an explosive to damage a building affecting interstate commerce, resulting in a death and personal injury in violation of 18 U.S. C. § 844(I), and the second charging that he used a destructive device during the crime of violence described in the first count, in violation of 18 U.S. C. § 924 (c)(1). Defendant was not arraigned in this Court on the original indictment until June 3, 2003, following his arrest on May 31, 2003 and his initial appearance in the United States District Court for the Western district of North Carolina on June 2, 2003.

The government obtained a superseding indictment on June 26, 2003. That charging instrument repeated the two charges in the origin indictment, but added allegations of "special findings" as prerequisites to the application of the death penalty under the Federal Death Penalty Act, 18 U.S.C. § 3591 et seq. Defendant was arraigned on the superseding indictment on July 11, 2003.

In a *Notice of Intent To Seek The Death Penalty* (hereinafter "Notice") filed on December 11, 2003, the government stated that it intends to seek the death penalty against Mr. Rudolph in the event of the defendant's conviction of the offense charged in the superseding indictment pursuant to the Federal Death Penalty Act of 1994, 18 U.S.C.§ 3591 *et seq.*

On December 12, 2003, over defendant's objection (see, *Defendant's Response to Government's Motion for a Scheduling Order*, filed November 3, 2003, doc. 52), this Court set August 2, 2004 as the trial date.

The Court had originally set August 4,2003 as the trial date following defendant's initial arraignment. However, on motion of the government filed on July 3, 2003 (doc. 21) the Court on

July 28, 2003 ordered the trial date vacated. The government's motion asserted three interrelated reasons for a continuance. First, the government contended that the case involved a massive amount of discovery materials that must be studied, absorbed, and organized by both the prosecution and defense counsel. Second, the government asserted that "as this case has death penalty implications, the matter must be submitted to the Department of Justice for death penalty review and authorization", which the government estimated "will take several months to complete". The third ground was a corollary of the second: because this case is one in which the government was likely to seek the death penalty, the trial will be legally complex, and one in which numerous pretrial motions will be necessary to prepare the case for trial.

In its order of July 28, 2003, granting the government's motion for continuance, this Court "conclude(d) that each of these grounds warrants a finding ...that continuance of the present trial setting ... is in the best interests of all parties concerned" and that "the ends of justice will be best served by insuring that this matter is carefully considered, prepared, and tried in a deliberate manner." The Court specifically found that "discovery will be a laborious and time-consuming process", and that it involves "massive amounts of documents and investigative material."

The Court noted that the Birmingham investigation alone involved some 100, 000 files, each containing multiple documents. The Court also noted that the "separate, but related investigation" of three bombings that occurred in Atlanta, Georgia may entail as much of 600,000 files. The Court found that "(i)n many instances, these are complex documents, such as witness statements and investigative memoranda, which require careful and time -consuming study." The Court concluded that " a miscarriage of justice could result if the parties are not allowed adequate time to review and digest the massive amount of investigative and forensic material involved in this case." Likewise, the Court found that this case is "'so unusual (and) so

complex, due to... the nature of the prosecution, or the existence of novel questions of fact or law" that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself" within the time limits established by the Speedy Trial Act, and that "adequate preparation for the trial of this case involves much more time than the seventy days anticipated by the Speedy Trial Act." The Court found that "the amount of discovery, the extent to which expert witnesses will be involved, and the death penalty implications of the case make it unusual and complex...." the Court further found that "(t)he complexity of the case stems from the voluminous discovery and the anticipated necessity of extensive pretrial motion practice." The Court also found that "(n)umerous issues are expected to arise that will require multiple pretrial hearings relating to multiple investigative searches, fugitive searches over a five year period of time, and the qualifications of various experts to be offered by both sides." Finally, the Court found that "(g)iven the complexity of the issues that arise from not just opne, but multiple bombing investigations, and which cover a period of time spanning seven years, it is unreasonable to expect counsel for either party to be ready for trial in August, much less during calender year 2003." ( *Order Continuing Trial Setting*, doc. 26)

## I.
## INTRODUCTION: UNREASONABLE DELAYS IN SEEKING DEATH

In *United States v. Colon-Miranda* (D. P. R. 1997) 985 F. Supp. 31 the Court explored what remedy was available in a federal capital case when the government unreasonably delayed the filing of a notice of intent to seek the death penalty. The Court held that the government would be precluded from seeking the death penalty and explained that "although we do not suggest the presence of any bad faith on the part of the government regarding this significant delay, this tardiness raises concerns of fairness and due process that are particularly salient in a capital case. Where the law includes the death penalty as a punishment, the government has every

right to seek it, but within the boundaries of constitutional jurisprudence." (Id. at p. 33.) The Court prefaced its discussion of the issues with a statement of the well recognized Eighth Amendment principle that "death is different":

> The consideration of whether to permit the government to go forward with its proceedings for certification entails the unique gravity appropriate for capital cases. Capital punishment is qualitatively different from any other form of criminal penalty we may impose. *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). With it, we deny the convict any possibility of rehabilitation and order instead his execution, the most irrevocable of sanctions. *Gregg v. Georgia*, 428 U.S. 153, 187, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Its severity demands a heightened need for reliability in the determination that death is the appropriate punishment in a specific case. *Caldwell v. Mississippi*, 472 U.S. 320, 323, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) (citing *Woodson*, 428 U.S. at 305, 96 S.Ct. 2978). We must be, therefore, particularly sensitive to insure that unique safeguards are in place that comport with the constitutional requirements of the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.
>
> (Id. at p. 33.)

One of the unique safeguards in place in a federal death penalty case is 18 U.S.C. §3593(a), which requires that the attorney for the government, if he or she "believes that the circumstances of the offense are such that a sentence of death is justified ..." to "serve on the defendant notice" of intent to seek the death penalty. Importantly, this notice must be filed "a reasonable time before the trial ..." Violation of this reasonableness requirement precludes the case going forward as a capital prosecution, regardless of a showing of prejudice. See, *United States v. Ferebe*, 332 F. 3d 722, 727, 730 (4th Cir. 2003); *United States v. Hatten*, 276 F. Supp. 2d 574, 576-577 (S.D. W. Va. 2003).

One obvious purpose of this provision is to allow defense counsel adequate time to meet the complex demands of preparing a death penalty case. See, *United States v. Ferebe*, 332 F. 3d 722, 727 (4th Cir. 2003) This purpose is served as long as there is a reasonable period of time between the notice and the current trial date.

Recently, the Fourth Circuit considered the issue regarding the timeliness of a Death

Notice. In *United States v. Ferebe*, 332 F.3d 722 (4th Cir.2003), the defendant challenged the district court's decision not to strike the Death Notice on the basis that he did not receive the Notice within a reasonable time before trial, as required by 18 U.S.C. § 3593(a). In examining this issue, the Fourth Circuit first determined that § 3593(a) is a prophylactic statute which protects an accused from being tried for a capital offense without reasonable notice. Id. at 727. The Court stated that its "indisputable purpose is to ensure that the accused will not be required to stand trial for his life without having received adequate notice before that trial that he is to stand trial for capital offense ..." (Id.) In other words, the Court said that a defendant's "rights are denied at the point when he proceeds toward trial, or actually to trial, in the absence of a reasonable time between his receipt of the Death Notice and his capital trial." Id. at 732. Moreover, the Court stated that *"this is so, regardless of whether he will or will not be, or was or was not, prejudiced by an unreasonably delayed Death Notice."* Id. (emphasis original). According to the Fourth Circuit, "the question of whether the statute has been violated by a prejudice inquiry is, pure and simple, to confuse the question of harmlessness with the question of violation." Id. at 736.

Thus, as a threshold matter, the Fourth Circuit held that § 3593(a) "must be interpreted to require an inquiry into the objective reasonableness of the time between issuance of the Death Notice and the trial itself, in light of the particulars of the charged offense and the anticipated nature of the defense." Id. at 727. As this inquiry is a protective measure which occurs before trial, the Fourth Circuit further stated that a district court's decision to deny a defendant's motion to strike a Death Notice is conclusive and collateral to the merits of the case. Therefore, the decision is immediately appealable because, if wrongly decided, it would irreparably deprive a defendant of the right not to stand trial for a capital offense without first being given reasonable notice that the death penalty is being sought. Id. at 730.

After finding the decision is immediately appealable as a collateral matter, the Fourth Circuit set forth the analytical framework to be applied to determine whether the prosecution complied with the reasonable notice requirement. This framework includes, among other relevant factors: (1) the nature of the charges presented in the indictment; (2) the nature of the aggravating factors provided in the Death Notice; (3) the period of time remaining before trial, measured at the instant the Death Notice was filed and irrespective of the filing's effects; and, in addition, (4) the status of discovery in the proceedings. Id. at 737 (footnote omitted). The Court ruled that " (i)t should be determined on the basis of these factors whether sufficient time exists following notice and before trial for a defendant to prepare his death defense." Id. at 737.

Others courts ruling on this issue have also used this analytical framework. See, *United States v. Hatten*, 276 F. Supp. 2d 574, 576-577 (S.D. W. Va. 2003); *United States v. Breedan*, 2003 WL 22019060 (W.D. Va. 2003). The defendant now considers this analytical framework in light of the present facts.

## II

## APPLICATION OF THE *FEREBE* FRAMEWORK INDICATES THAT THE NOTICE OF SPECIAL FINDINGS AND THE NOTICE OF INTENT TO SEEK THE DEATH PENALTY MUST BE DISMISSED

### 1. The Nature of the Charges

Courts considering this factor have looked to whether " the underlying factual basis (or) the elements of the offenses charged are complex or unusual" (*Hatten*, 276 F. Supp. 2d at 578), whether defendant's role in the alleged murder was known to the Government well before the Superceding Indictment (Id.), and whether "legal and factual issues alleged do not appear so complex or atypical such that (a particular period) would be an unreasonably short period of time to prepare a defense." (*Breeden*, 2003 WL 22019060 at p. 3). In *Hatten*, the lack of complexity

of the charges coupled with the government's advanced notice of the defendant's alleged role in the offense indicated to the court that the government had no justification for delaying the filing of the death notice, a fact which the court weighed in favor of its ultimate decision that the death notice must be dismissed. In *Breeden*, the court reached the opposite result, in part because "(t)he legal and factual issues alleged do not appear so complex or atypical such that five months would be an unreasonably short period of time to prepare a defense." (Id. at 3).

In this case, this Court has already found that this case is unusual and complex for the variety of reasons stated in the Court's order of July 28, 2003. At the same time, the government, but not the defense, has been extensively preparing this case with limitless manpower and resources since its inception in January, 1998. Further, by January 30, 1998, when a warrant of arrest was issued for the defendant as a material witness, the government's investigation has been focused on the defendant. The government has certainly had more than ample time to decide whether Mr. Rudolph should face the death penalty. And contrary to the submission of the government in its July 3, 2003 continuance motion, it did not take "several months to complete" the death penalty authorization period, but a full six and one half months from the date of defendant's initial arrest.

In contrast to the time already allotted to the government to prepare its case against defendant, defense counsel was not appointed until June 3, 2003. And although the defense now has a functional team up and running, for all of the reasons stated in *Defendant's Response to Government's Motion for a Scheduling Order*, it is simply unrealistic to expect that given the sheer size and scope of this case that the defense could be prepared to meet the heavy demands of preparing for a guilt and penalty phase of a capital trial in the seven month time period between the filing of the death notice and the current trial date.

In the Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality

of Defense Representation, prepared by the Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States (hereinafter referred to as the Spencer Report), **www.uscourts.gov/ dpenalty/1COVER.htm** , the Committee discussed the complex nature of counsel's task in a death penalty case:

> Evidence in the penalty phase of a federal death penalty trial typically includes a wide range of information about the defendant, the victim, and the nature of the offense that is not admissible in the guilt phase. Defense counsel in a federal death penalty case must investigate and be prepared to respond to information offered by the prosecution to justify a death sentence. Federal law allows prosecutors to offer reliable information in the penalty phase, even if it does not satisfy the normal rules of evidence. Although the prosecution must prove certain aggravating circumstances spelled out by statute, it is not limited to proving these factors. Defense counsel must therefore investigate and prepare to meet potential "non-statutory aggravating circumstances," such as an allegation that the defendant will be dangerous in the future. The penalty phase of a federal death penalty case therefore may include yet another "trial" in which the jury is required to determine whether the defendant is responsible for crimes in addition of those charged in the indictment...
>
> Spencer Report at p. 12

In addition to defending against the prosecution's case for a death sentence, counsel must also plan and present a case for a lesser sentence and he will be judged ineffective if he does not. See e.g., *Wiggins v. Smith*, __U.S.__, 123 S. Ct. 2527. In order to effectuate the defendant's constitutional right to present any information in mitigation of sentence, counsel must conduct a broad investigation of the defendant's life history.

> Although it makes no express demands on counsel the [right to offer mitigating evidence] does nothing to fulfill its purpose unless it is understood to presuppose the defense lawyer will unearth, develop, present and insist on consideration of those 'compassionate, or mitigating factors stemming from the diverse frailties of human kind. Indeed, one of the most frequent grounds for setting aside state death penalty verdicts is counsel's failure to investigate and present available mitigating information. The broad range of information that may be relevant to the penalty phase requires defense counsel to cast a wide net in the investigation of any capital case. (Footnotes omitted).
>
> Spencer Report at pp. 13-14

The Spencer Report emphasizes defense counsel's many obligations regarding these time consuming tasks which cannot possibly be completed without substantial preparation time after the filing of the notice to seek the death penalty. The government's unjustified failure to file its Notice until seven months before trial places 'the defendants and (his) attorneys...against the wall in an uncomfortable, rushed procedural scenario that offends traditional notions of fair play, preventing them from effectively representing their clients." *United States v. Colon-Miranda* (D. P. R. 1997) 985 F. Supp. at 35.

**2. The Nature of the Aggravating Factors Provided in the Death Notice**

In *Hatten*, the court reasoned:

> (T)he "nature of the aggravating factors provided in the Death Notice" tilts toward Defendant's position. The basis for the statutory factors was identified early on: the alleged killing was intentional and resulted after substantial planning and premeditation. The non-statutory factors (future dangerousness, victim impact, and obstruction of justice) were likewise uncomplicated, legally and factually, and well known to the Government for months before the Death Notice. Nothing occurred in the procedural development of the case to impede the Government's review and decision as to the factors it would assert to justify seeking the death penalty. In short, despite a trial date of August 12, the Government took more than three months after the Superceding Indictment to provide the formal Death Notice.
>
> 276 F. Supp. 2d at 579

The same reasoning applies with greater force in this case where the government took more than five months after the superseding indictment to provide a formal death notice that alleges fewer aggravating circumstances than those alleged in Hatten, where the death notice was dismissed as untimely.

**(3) The Period of Time Remaining Before Trial**

It is significant in considering this factor that in *Ferebe* , the defendant "present(ed) some evidence, and the prosecution d(id) not challenge it, that, nation-wide, federal prosecutors file Death Notices, upon authorization by the Attorney General, with an average of 8.4 months

remaining before trial." 332 F. 3d at 725. Seven months is below the preparation norm even in an average case and this case, as this Court has already found, is anything but average.

Nor can the government escape the force of this argument by alleging that the defense had actual notice of the possibility of the death penalty before the notice was filed. As was held in *Hatten*, based on the reading of *Ferebe*, "the Court must consider the actual date the Death Notice was formally filed and not some date Defendant knew or should have known that the Government would seek the death penalty." 276 F. Supp. 2d at 579 Moreover, "(t)he issue is not whether the Death Notice comes too late for Defendant to prepare for trial. *Ferebe* is clear that prejudice to the defense is not a factor. The test does not turn on a defendant's ability to prepare for trial, so delaying the trial date is not a remedy for an untimely Death Notice." (Id. at 579 n. 4)

Although prejudice need not be a factor in finding a violation of the statute, it is clear for all of the reasons stated above that in this particular case, Mr. Randolph will be prejudiced if his lawyers are forced to trial in August 2004. In sum, this case, unlike *Breeden*, is one in which the legal and factual issues alleged are so complex and atypical that seven months is an unreasonably short period of time to prepare a defense to an extremely complex capital case.

**(4) The Status of Discovery in the Proceedings**

The discussion of this factor in *Hatten* is again on point in this case:

> The last enumerated factor is the "status of discovery." Here, the Court notes that the Government provided the bulk of its disclosures and discovery material in November 2002, while the original Indictment was still in play. As the case advanced to the Superceding Indictment, more discovery was provided by the Government in a series of supplemental disclosures. While supplemental disclosures have continued, the Court finds that most of the new material relates to the Government's experts on the death penalty issues. There have been few disputes between the parties, so the Court has held no significant role in disposing of discovery motions. Again, neither the information provided in the ongoing disclosures nor any procedural issue has affected the ability of the Government to issue its Death Notice. Therefore, the Court finds the status of discovery

> reinforces the Court's conclusion that the Government should have acted more quickly in filing the Notice.
>
> 276 F. Supp. 2d at 579 -580

Here, too, the government has been sitting on the discovery material in this case for years and nothing about the way in which the prosecution has chosen to distribute that discovery to the defense has in any way impaired the government's ability to file it's death notice. It has, however, impeded the defendant's ability to prepare a meaningful defense in the seven month period remaining before trial. Among other things, the government has taken the unjustified position that the defense is not entitled to discovery of laboratory bench notes and other items crucial to a fair assessment of the government's scientific evidence. Defendant has filed a motion challenging that position, but it is clear that by the time the issue is litigated and the defense is finally given access to this material and an opportunity to discuss it with its own experts, the date of the current trial will have passed.

Accordingly, for the foregoing reasons, the Court should find that the Death Notice was not filed a reasonable time before trial, as required by 18 U.S.C. § 3593(a).

## CONCLUSION

WHEREFORE, for any or all of the foregoing reasons, Mr. Rudolph requests this Court to enter an order dismissing the Notice of Special Findings in the superseding indictment and dismissing the Government's Notice of Intent to Seek the Death Penalty.

Respectfully submitted,
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Dated: April 8, 2004


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## CERTIFICATE OF SERVICE

I do hereby certify that I have served upon the attorney for the government the defendant's Motion to Strike the Death Penalty and accompanying Appendix by hand delivery of one copy of the same delivered to:

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Robert J. McLean
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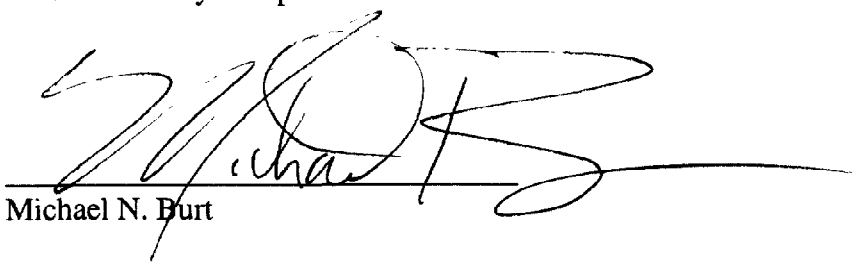
This the 8th day of April 2004.



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